UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-41338
Summary Calendar

D.C. Docket No. 9:96-CV-169

DENNIS JOSLIN, Certified Public Accountant

Plaintiff – Appellee

v.

WALTER YOUNAS STEWART, ET AL

Defendants

WALTER YOUNAS STEWART

Defendant – Appellant

Appeal from the United States District Court for the Eastern District of Texas, Lufkin.

Before REYNALDO G. GARZA, BARKSDALE, and DENNIS, Circuit Judges.

JUDGMENT

(Filed Sep. 8, 1998)

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: NOV 3 1998

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Illegible
Deputy

New Orleans, Louisiana NOV 3 1998

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 97-41338

Summary Calendar

DENNIS JOSLIN, Certified Public Accountant,

Plaintiff-Appellee,

VERSUS

WALTER YOUNAS STEWART, ET. AL.,

Defendants,

WALTER YOUNAS STEWART

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(9:96-CV-169)

(Filed Sep. 8, 1998)

Before REYNALDO G. GARZA, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Walter Stewart executed four separate promissory notes totaling $256,000.00 to Sam Houston National Bank of Huntsville, Texas in 1983, 1984, and 1985. During the signing of the notes, Stewart also executed four deeds of trust on four individual tracts of land to secure the notes. Each of the deeds of trust contained a cross-collateralization clause which provided that each deed of trust secured "all indebtedness" of Walter Stewart to the bank, whether past, present or future and incurred by any means.

The first tract of land, conveyed by the deed of trust on July 13, 1983, pledged a 70.773 acre plot of land which fronts a county road. The other three parcels of land are essentially land-locked and cannot be reached except by use of the first tract of land. There is an easement along a creek bed, but it is unreliable due to its location and possible flooding.

Stewart defaulted on the four notes and then filed voluntary Chapter 12 bankruptcy in the Eastern District of Texas. The bankruptcy court entered an Order Confirming Debtors' Chapter 12 Plan of Reorganization on June 16, 1988. Under his Plan, Stewart committed to repay a total of $102,855.20 out of the $256,000.00 that he originally borrowed from the Sam Houston National Bank of Huntsville, Texas under the four notes. The Plan did not address the cross collateralization clauses.

On April 16, 1993, in accordance with 11 U.S.C. Section 1222(b)(9), the bankruptcy court entered an Order Modifying Debtors' Chapter 12 Plan. The bankruptcy court's order held that the modifications requested were "not material." The order's effect was to extend the terms

of payment to the secured creditors so that the Stewarts could continue to make payments on their debts after the time period contemplated by the Chapter 12 Plan was terminated. The modified plan indicated that the amount of the indebtedness secured by the four tracts of land, at that time, was approximately $92,231.35.

The modification order also provided that the Stewarts could prepay any secured claim by paying the unpaid balance of the note, principal and accrued interest and shall "thereupon be entitled to and said creditor shall forthwith issue a release of lien on said property and otherwise extinguishing any debt secured or formerly secured thereby." This language is essentially the same as the language of the initial plan submitted by the bankruptcy court.

Dennis Joslin then purchased the four notes and deeds of trust from the FDIC, the successor in interest to the Sam Houston National Bank of Huntsville, Texas. Joslin filed suit for judicial foreclosure under the deeds of trust. Both parties filed motions for summary judgment.

Stewart asserted that *res judicata* should apply because the modification order showed that the cross-collateralization issue was litigated and was specifically addressed.

Joslin, on the other hand, contended that the modification order could not have set aside the cross-collateralization provision without resulting in an impermissible "material modification." Joslin further argued that the issue of cross-collateralization was not only not litigated, but was not even mentioned in any of the bankruptcy documents.

The United States District Court for the Eastern District of Texas granted Joslin's motion for summary judgment. Judge John Hannah entered a partial summary judgement in favor of Joslin on September 19, 1996, and on September 24, 1997 entered final summary judgment granting the relief requested by Joslin, namely the foreclosure of the deed of trust liens on the property owned by STEWART, as well as an award of attorney's fees and costs of court.

The district court agreed with Joslin that the modification order entered April 19, 1993 was not *res judicata* as to the cross-collateralization issue. The court noted that the issue of cross-collateralization clauses was not the subject of any of the bankruptcy proceedings. Moreover, the court found that if the modification order was intended to terminate the cross-collateralization rights of the note holder, this would be an impermissible material modification of the Plan. The court also stated that if it was the intention of Plaintiffs to eliminate the cross-collateralization terms of the deeds of trust, this should have been expressly stated within the documents. Furthermore, the fact that it was not mentioned must be construed against the Debtors who were the drafters of the documents.

On October 22, 1997 Stewart perfected his appeal to this court.

Discussion

I. Summary Judgment

The Fifth Circuit reviews a grant of summary judgment *de novo*, applying the same standard applied by the district court. *Lubbock County Hosp. Dist. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 143 F.3d 239, 241 (5th Cir. 1998). In reviewing a motion for summary judgment, we view the evidence in the light most favorable to the non-moving party. *Bloom v. Bexar County, Texas*, 130 F.3d 722, 724 (5th Cir. 1997). Summary judgment is proper if the evidence when so viewed demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a mater [sic] of law. FED. R. CIV. P. 56(c); see *Bloom*, 130 F.3d at 724. The party seeking summary judgment carries the burden of showing that there is lack of evidence supporting the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 91 L.Ed.2d 265 (1986).

After reviewing the district court's granting of summary judgment *de novo*, this court affirms its decision in granting Joslin's motion and its denial of STEWART's motion.

II. *Res judicata*

Res judicata is utilized when claims have already been judicially acted upon or decided. *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 179 (5th Cir. 1997). In order for *res judicata* to apply, four requirements must be satisfied. *Gulf Island-IV, Inc., v. Blue Streak-Gulf Is Ops*, 24 F.3d 743, 746 (5th Cir. 1994), *cert. denied*, 513 U.S. 1155

(1995). First, the parties in the instant action must be the same as or in privity with the parties in the prior action. *Russell v. Sunamerica Securities, Inc.*, 962 F.3d 1169, 1172-73 (5th Cir. 1992). Second, "the court that rendered the prior judgment must have been a court of competent jurisdiction." *Gulf Island-IV, Inc.*, 24 F.3d at 746. Third, there must be a final judgment on the merits. *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 179 (5th Cir. 1997). Fourth, the same cause of action must be involved in both suits. *Id.*

The element at issue in this case is whether there has been a final judgment on the merits. The district court was correct in its conclusion that the modification order did not render a final judgment in regard to the cross-collateralization clauses. The issue of the cross-collateralization clauses was not the subject of any of the bankruptcy proceedings. The district court noted that the Plan submitted by the Stewarts to the bankruptcy court for its approval provided "[i]n this particular Plan all Deed of Trust lienholders will be allowed to maintain their respective liens on the property described on the Schedules in the Chapter 12 Plan, to the full extent of the Plan Secured Values." Clearly this language supports Joslin's contention and the court's decision that the bankruptcy court did not intend to terminate the cross-collateralization rights of the note holder.

In addition, this court agrees with the district court's finding that the elimination of the cross-collateralization clauses under the modification order would constitute an impermissible material modification of Stewart's Chapter 12 Plan. Under the Bankruptcy Code, a Modification Order is prohibited from creating "a change in the rights of a [secured creditor] from what such rights were under

the Plan before modification." 11 U.S.C. §1223(c) (1998). Furthermore, the Modification Order itself states that "the modifications . . . are not material." Moreover, as the district court noted, if the plaintiffs intended to eliminate the cross-collateralization terms of the deeds of trust, this should have been expressed within the documents. The fact that it is not mentioned must be construed against against [sic] the Debtors who were the drafters of the documents. *In re Fawcett*, 758 F.2d 588, 591 (11th Cir. 1985); *In re Duplechain*, 111 B.R. 576 (W.D. Louisiana 1990).

Accordingly, this court affirms the district court's decision that the modification order is not *res judicata* to the cross-collateralization issue. In addition, Appellant's remaining contentions are not viable and are without merit because the modification order did not eliminate the cross-collateralization clauses. Therefore, this court affirms the district court's decision in all respects.

AFFIRMED.

November 5, 1998

Re: 9:96-cv-00169

Notice sent to:

James Haralson Pearson
Jeffrey W Wheelock
John Fredrick Berry

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-41338

DENNIS JOSLIN, Certified Public Accountant

Plaintiff – Appellee

v.

WALTER YOUNAS STEWART, ET AL

Defendants

WALTER YOUNAS STEWART

Defendant – Appellant

Appeal from the United States District Court for the Eastern District of Texas, Lufkin

---

ON PETITION FOR REHEARING

(Filed Oct. 26, 1998)

Before REYNALDO G GARZA, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Illegible
United State Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

DENNIS JOSLIN, *Plaintiff,* V. WALTER YOUNAS STEWART and KIM STEWART, *Defendants.*	§ § § § § § § §	CIVIL ACTION NO. 9-96CV169

FINAL JUDGMENT

(Filed Sep. 24, 1997)

On the date set forth below, at a regular term of this Court, and in its regular order on the docket, came on to be heard the Motion For Summary Judgment (the "Motion") filed by Plaintiff Dennis Joslin against Defendants Walter Younas Stewart and Kim Stewart. The Court, after considering the Motion, the supporting affidavit and exhibits, the pleadings and discovery filed in this case, and the argument of counsel, is of the opinion that the Motion should be granted. It is therefore:

ORDERED that the Motion For Summary Judgment of Dennis Joslin is GRANTED; it is further

ORDERED that Dennis Joslin have and recover $7,500.00, from Walter Younas Stewart, representing the reasonable and necessary attorneys' fees incurred to date in this action; it is further

ORDERED that Dennis Joslin have and recover of and from Walter Younas Stewart $10,000.00, representing

reasonable and necessary attorneys' fees to defend an appeal to the Fifth Circuit Court of Appeals, but such sum is remitted if no appeal is taken to the Court of Appeals; $5,000.00 to prepare or respond to an application to the U.S. Supreme Court for Writ of Certiorari, but such sum is remitted if neither party files an application to the United States Supreme Court for writ of certiorari, it is further;

ORDERED that Dennis Joslin have and recover of and from Walter Younas Stewart post-judgment interest on attorneys' fees as allowed by law at the legal rate of 5.60% percent per annum, from the date this judgment is entered until the judgment is paid in full; it is further

ORDERED that Dennis Joslin shall have judicial foreclosure of a lien on the following described property:

> 62.026 acres of land out of and a part of the JOHN BEATY SURVEY A-7 in Houston County, Texas, out of a tract called 164.7 acres and described as the 4th tract in a deed from Hazel Younas to Walter Stewart dated Feb. 13, 1979 recorded in Vol. 623 page 170 of the Houston County Deed Records, this 62.026 acre tract being more particularly described by metes and bounds as follows:
>
> BEGINNING on an iron post set for the SW corner of this tract and the NW corner of a 158.121 acre tract (formerly called 149.3 acres) and being N 00 deg 04 min 33.574 sec E 2797.258 feet and N 00 deg 27 min E 539.6 feet from the most SW corner of the Walter Stewart original tract, also being N 00 deg 27 min E 539.6 feet from the SE corner of the Walter Stewart tract called 100 acres;

THENCE N 00 deg 27 min E 1315.0 feet to iron post set for corner in the West line of the said 164.7 acre tract, same being the SW corner of a 62.135 acre tract;

THENCE S 89 deg 29 min 55.011 sec E 2040.532 feet to iron post set for corner in the East line of the said 164.7 acre tract, same being the SE corner of the said 62.135 acre tract;

THENCE South 1315.0 feet to iron post found for corner, same being the NE corner of a 158.121 acre tract;

THENCE N 89 deg 30 min W 2059.86 feet to the place of beginning and containing 62.026 acres of land, more or less.

and

An easement in common with Grantors for access, ingress and egress upon, over and across the following strip of land:

A strip of land 30 ft. in width for the purpose of ingress and egress to and from the above 62.026 acre tract, being 15 feet on each side of the following described centerline:

BEGINNING in the NB line of the above 62.026 acre tract, 15 fee [sic] West of its NE corner;

THENCE North parallel with the E B line of a 62.135 acre tract (described in Deed of Trust recorded in Vol. 804 page 648 Official Records of Houston County, Texas) at 1324' cross N B L of said 62.135 acre tract and the SB line of a 62.244 acre tract (described in Deed of Trust recorded in Vol. 773 page 348 of the Official Records of Houston County, Texas) at approximately 2524 ft. a point near the NE corner of said 62.244 acre tract and Hurricane Bayou;

THENCE in the northeasterly direction along the SE side of said Bayou, across a 70.733 acre tract owned by Walter Stewart, along a passable route, to intersect the S or SW margin of the Halls Bluff Road.

The lien is set forth in a certain Deed of Trust recorded in Volume 819, Page 113 under the Official Public Records of Real Property of Houston County, Texas. The Deed of Trust described above was extended and carried forward by an Extension of Lien recorded in Volume 856, Page 484 of the Official Public Records of Real Property of Houston County, Texas; it is further

ORDERED that Dennis Joslin shall have judicial foreclosure of a lien on the following described property:

SECOND TRACT: 70.733 acres out of and a part of the JOHN BEATTY SURVEY, A-7 and the ELIJAH GOSSETT SURVEY, A-34 in Houston County, Texas and also being out of and a party of a called 369 acre tract in the BEATTY SURVEY and out of and a part of a called 176.5 acre tract in the GOSSETT SURVEY, also being out of and a part of the same land conveyed to Walter Stewart in a Deed recorded in Vol. 616, Page 215 of the Houston County Deed Records, which 70.733 acres more particularly described by metes and bounds as follows:

BEGINNING on a point in the center of County Road and the center of Hurricane Bayou for the North corner of this tract, same being in the North line of said 369 acre tract;

THENCE with the meanders of said County Road as follows: S 30 deg 38' E 379.92 feet; S 52 deg 47' E 150.92 feet; S 76 deg 48' 36.219" E 537.16 feet; S 52 deg 00' E 211.61 feet; S 15 deg

14' E 283.79 feet and S 32 deg 38' E 160.76 feet to corner of same, set Iron Rod for reference corner in South West fence line if said County Road;

THENCES [sic] 4 deg 25' W 887.47 feet to Iron Post set for corner, same being the North East corner of a 123.703 acre tract;

THENCE N 89 deg 43' 37.21" W 1993.13 feet to Iron Post set for corner;

THENCE North 1010.86 feet to corner and center of Hurricane Bayou, set Iron Rod for reference corner, South 15 feet;

THENCE with the meanders of said Hurricane Bayou as follows: N 5 deg 07' 58.48" E 334.64 feet; N 85 deg 06' E 110.23 feet; S 44 deg 35' E 200.13 feet; N 8 deg 04' E 195.21 feet; N 84 deg 51' E 141.07; N 4 deg 49' E 86.94 feet; N 89 deg 31' E 172.24 feet; N 36 deg 33' W 259.18 feet; N 77 deg 51' E 137.79 feet; N 15 deg 28' E 129.59 feet and N 70 deg 49' E 269.03 feet to the place of beginning and containing 70.733 acres of land more or less, as surveyed on February 11, 1980 by C R Hodges, Registered Public Surveyor No. 1645, Texas.

The lien is set for in a certain Deed of Trust recorded in Volume 223, Page 21 of the Deed of Trust Records of Houston County, Texas. The Deed of Trust described above was extended and carried forward by an Extension of Real Estate Note and Lien recorded in Volume 856, Page 480 of the Official Public Records of Real Property of Houston County, Texas; it is further

ORDERED that Dennis Joslin shall have judicial foreclosure of a lien on the following described property:

Field Notes for 62.244 Acres
JOHN BEATY SURVEY, A-7
Houston County, Texas

62.244 acre out of and a part of the John Beaty Survey A-7, in Houston County, Texas and being out of and a part of the called 164.7 acre tract conveyed to Walter Stewart in a deed recorded in the Houston County Deed Records, which 62.244 acres more particularly described by metes and bounds as follows:

BEGINNING on an iron rod set at fence corner post for corner, same being the South East corner of an 18 acre tract and the North East corner of a 99.739 acre tract owned by Walter Stewart and being in the West line of the said called 64.7 acre tract;

THENCE N 00° 27' E 183.0 feet to corner in the center of Hurricane Bayou, set iron rod for reference corner S 00° 27' W 15.0 feet;

THENCE with the center of said Bayou as follows: N 76° 27' E 150.0 feet, N 45° 15' E93.0 feet, N 21° 10' W 215.0 feet, N 59° 40' E 150.0 feet, N 89° 25' E 80.0 feet, S 47° 15' E 106.0 feet, S 34° 05' W 220.0 feet, S 73° 10' E 133.0 feet, N 55° 45' E 178.0 feet, S 63° 00' E 77.0 feet, S32° 35' W 204.0 feet, S 21° 20' E 85.0 feet, N 61° 35' E 82.0 feet, N 37° 30' E 343.0 feet, S 47° 00' E 114.0 feet, S 22° 40' W 240.0 feet, S 14° 35' W 133.0 feet, S 82° 40' E 106.0 feet, N 60° 30' E 217.0 feet, S 62° 32' E 70.0 feet, S 19° 35' W 160.0 feet, N 69° 55' E 153.0 feet, N 56° 15' E 169.0 feet, N 49° 53' E 356.0 feet, S 77° 53' E 153.0 feet, S 5° 30' W 77.0 feet, S 74° 10' W 167.0 feet, S 31° 20' E 198.0 feet, N 23° 35' E 152.0 feet and S 85° 21' 00.346" E 224.271 feet to corner in same, found iron pipe

for reference corner South, 15.0 feet, same being the North East corner of said called 164.7 acre tract;

THENCE South, 1230.84 feet to iron post set for corner, in the East line of the said called 164.7 acre tract;

THENCE N 89° 29' 49.937" W 2039.133 feet to iron post set for corner, same being in the West line of said called 164.7 acre tract

THENCE N 00° 27' E 1163.826 feet to the place of beginning and containing 62.244 acres of land more or less

Field Notes Prepared April 1984.

The lien is set forth in a certain Deed of Trust recorded in Volume 773, Page 348 of the Official Public Records of Real Property of Houston County, Texas. The Deed of Trust described above was extended and carried forward by an Extension of Lien recorded in Volume 856, Page 482 of the Official Public Records of Real Property of Houston County, Texas; it is further

ORDERED that Dennis Joslin shall have judicial foreclosure of a lien on the following described property:

BEING 62.135 acres of land out of the JOHN BEATY LEAGUE A07 in Houston County, Texas, being out of and a part of a tract called 164.7 acres and described as the 4th tract in a deed from Hazel Younas to Walter Stewart dated Feb. 13, 1979 recorded in Vol. 623 page 170 of the Houston County Deed Records, and described by metes and bounds as follows:

BEGINNING on an iron post set for the Northwest corner of this tract and the Southwest corner of a 62.244 acre tract (also being part of the 164.7 acre tract) and being in the West line of the 164.7 acre tract) and being in the West line of the 164.7 acre tract and also being S 00 deg 27 min W 1346.826 feet from the NW corner of said called 164.7 acre tract;

THENCE S 89 deg 29 min 49.937 sec E 2039.133 feet to iron post set for corner in the East line of the said called 164.7 acre tract, same being the SE corner of the said 62.244 acre tract;

THENCE South 1324.0 feet to iron post set for corner in the East line of the said called 164.7 acre tract;

THENCE N 89 deg 29 min 55.011 sec W 2049.532 feet to iron post set for corner in the West line of said tract called 164.7 acres;

THENCE N 00 deg 27 min E 1324.0 feet to the place of beginning and containing 62.135 acres of land, more or less.

TOGETHER WITH:

An easement in common with Grantors for access, ingress and egress upon, over and across the following strip of land:

Beginning at the northeast corner of the aforesaid 62.135 acre tract, being the southeast corner of a 64.244 acre tract described in deed of trust dated Apr. 2, 1984 recorded in Vol. 773 page 348 of the Official Records of Houston County, Texas, from Walter Younas Stewart to Morris I. Waller, Trustee;

THENCE North along the east line of said 64.244 acre tract to point near its NE corner and Hurricane Bayou;

THENCE in a northeasterly direction along the SE side of said Bayou, across a 70.733 acre tract owned by Walter Stewart, along a passable route, to intersect with the S or SW margin of the Halls Bluff Road.

The lien is set forth in a certain Deed of Trust recorded in Volume 804, Page 648 of the Official Public Records of Real Property of Houston County, Texas. The Deed of Trust described above was extended and carried forward by an Extension of Lien recorded in Volume 856, Page 478 of the Official Public Records of Real Property of Houston County, Texas; it is further

ORDERED that an order of sale shall issue to any sheriff or constable in the State of Texas, or to any like officer of the United States of America, to seize and sell the above-described properties the same as under execution in satisfaction of this judgment. The sheriff or other officer executing the order of sale shall place the purchaser of the above-described properties in possession within 30 days after the date of sale. The order of sale shall have the same force and effect as that of a writ of possession between the parties in this action and any person claiming under the defendants by any right acquired pending this action; it is further

ORDERED that Dennis Joslin shall be entitled to all writs, execution and processes allowed by law in order to recover and collect all sums awarded to it pursuant to this judgment.

SIGNED this 22nd day of September, 1997.

/s/ John Hannah, Jr.
JUDGE PRESIDING

APPROVED:

PEARSON & PEARSON, P.C.

THOMAS A DICKINSON
State Bar No. 05836400
James H. Pearson
State Bar No. 15691200
1200 Smith Street
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Houston, Texas 77002
(713) 739-8600
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Attorney for Dennis Joslin
September 24, 1997
Re: 9:96-cv-00169
Notice sent to: James Haralson Pearson
Jeffrey W. Wheelock
John Fredrick Berry

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

DENNIS JOSLIN	§	
	§	CIVIL ACTION NO.
V.	§	9:96CV169
	§	
WALTER YOUNAS STEWART	§	
and KIM STEWART	§	

MEMORANDUM AND ORDER OF
SUMMARY JUDGMENT

(Filed Sep. 16, 1996)

Before the Court is Plaintiff's Motion for Summary Judgment which seeks judicial foreclosure of four tracts of real property as well as Defendants' Motion for Partial Summary Judgment. For the reasons stated below, it is the opinion of the Court that Plaintiff's Motion for Summary Judgment is well taken in some respects and should be GRANTED IN PART and that Defendants' Motion for Partial Summary Judgment is not well taken and should be DENIED.

BACKGROUND

Defendant Walter Stewart executed four separate promissory notes totaling $256,000.00 to Sam Houston National Bank of Huntsville, Texas in 1983, 1984, and 1985. At the same time that Defendant signed these notes, he also executed a deed of trust on four individual tracts of land to secure the notes. Each of these deeds of trust contained a cross-collateralization clause which provided that each deed of trust secured "all indebtedness" of

Walter Stewart to the bank, whether past, present or future and incurred by any means. Kim Steward [sic] did not execute any of the notes or deeds. Plaintiff, Dennis Joslin is current owner and holder of the notes in question.

The first tract of land, conveyed by deed of trust on July 13, 1983, pledged a 70.773 acre plot of land which fronts a county road. The other three parcels of land are essentially land-locked and cannot be reached except by use of the 70.773 acre tract. There is an easement along a creek bed, but it is unreliable due to its location and possible flooding.

The Stewarts filed voluntary Chapter 12 bankruptcy in the Eastern District of Texas under cause number L-87-01295. The bankruptcy court entered an Order Confirming Debtors' Chapter 12 Plan of Reorganization on June 16, 1988. On April 16, 1993, in accordance with 11 U.S.C. Section 1222(b)(9), the bankruptcy court entered an Order Modifying Debtors' Chapter 12 Plan. This order contains the holding that the court found the modifications requested were "not material." This order basically extended the terms of payment to the secured creditors so that the Stewarts could continue to make payments on their debts after the time period contemplated by the Chapter 12 Plan was terminated. The modified plan indicated that the amount of indebtedness secured by the four tracts of land, at that time was approximately $92,231.35. The modification listed several other loans, not the subject of the case now under consideration.

The modification order also provided that the Stewarts could prepay any secured claim by paying the

unpaid balance of the note, principal and accrued interest and shall "thereupon be entitled to and said creditor shall forthwith issue a release of lien on said property and otherwise extinguishing any debt secured or formerly secured thereby." This language is essentially the same as the language of the initial plan submitted to the bankruptcy court by the Plaintiffs.[1]

The defendants assert that this modification order shows that the cross collateralization issue was litigated and was specifically addressed and that therefore, "it is obvious that *res judicata* should apply."

Plaintiff, on the other hand, argues that the modification order could not have set aside the cross-collateralization provisions without affecting an impermissible "material modification." Plaintiff further argues that the issue of cross-collateralization was not only not litigated, it was not even mentioned in any of the bankruptcy documents.

SUMMARY JUDGMENT

Summary judgment is appropriate when the movant is able to demonstrate that the pleadings, affidavits and other evidence available to the court establish that there are no genuine issues of material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c); *see generally* 10 & 10A Wright, Miller & Kane, *Federal Practice and Procedure* I 2711-2742.

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[1] "Debtors' Chapter 23 Plan" at page 3.

When determining whether to grant summary judgment, the court is merely determining whether a factual dispute exists, and may not resolve those disputes by weighing the evidence or engaging in credibility determinations. *Anderson*, 477 U.S. at 249-250. The evidence of the non-movant is to be believed, and all inferences are to be drawn in the non-movant's favor. *Eastman Kodak Co. v. Image Technical Services, Inc.*, ___ U.S. ___, ___, 112 S. Ct. 2072, 2077 (1992). That it may appear to the court that the non-movant is unlikely to prevail at trial or that the movant's statement of facts appears more plausible is not a valid reason to grant summary judgment. *Jones v. Western Geophysical Co. of America*, 669 F.2d 280, 283 (5th Cir. 1982); *Schweitzer v. University of Texas Health Center*, 688 F. Supp. 278, 288 (E.D. Tex. 1988). Nonetheless, the summary judgment device is not "a disfavored procedural short-cut, but rather an integral part of the Federal Rules as a whole, which are designed 'to serve the just, speedy and inexpensive determination of every action.' " *Celotex*, 477 U.S. at 327.

DISCUSSION

After review of the documents submitted by the parties that relate to the bankruptcy proceedings, the Court is of the opinion that the issue of the cross-collateralization clauses was not the subject of any of the bankruptcy proceedings. The plan submitted by the Stewarts to the bankruptcy court for its approval provided "In this particular Plan, all Deed of Trust lienholders will be allowed to maintain their respective liens on the property described on the Schedules in the Chapter 12 Plan, to the full extent of the Plan Secured Values."

The Court agrees with Plaintiff, that if the modification order was intended to do away with the cross-collaterization rights of the note holder, this would be an impermissible material modification of the plan. If it was the intention of Plaintiffs to eliminate the cross-collateralization terms of the deeds of trust, this should have been set out within the documents. The fact that it is not mentioned must be construed against the Debtors who were the drafters of the documents. *In re Fawcett*, 758 F.2d 588, 591 (11th Cir. 1985); *In re Duplechain*, 111 B.R. 576 (W.D. Louisiana 1990).

Accordingly, the Court finds that the modification order entered April 19, 1993 is not *res judicata* as to the cross-collaterization issue.

However, the evidence submitted by the parties is contradictory as to the indebtedness actually owed by Defendants on the four notes in question and any other indebtedness which may be secured by the subject deeds in trust. Therefore, the Court is not convinced that Plaintiff has met his burden of showing that he is entitled to a judicial foreclosure as a matter of law. Accordingly,

IT IS ORDERED that the Plaintiff's Motion for Summary Judgment is granted to the extent that the Court holds that the cross-collaterization issue is not subject to *res judicata* under the bankruptcy court's modification order.

IT IS ORDERED that the Plaintiff's Motion for Summary Judgment as to his entitlement to judicial foreclosure is DENIED at this time.

IT IS FURTHER ORDERED that Defendants' Motion for Partial Summary Judgment is hereby DENIED.

SIGNED this 11th day of September, 1996.

/s/ John Hannah, Jr.
JOHN HANNAH, JR.
UNITED STATES DISTRICT COURT

September 17, 1996

Re: 9:96-cv-00169

Notice sent to:

James Haralson Pearson
Jeffrey W Wheelock
John Fredrick Berry